APPENDIX A

STATE OF MICHIGAN
In the Circuit Court for the County of Ingham

BUILDING OWNERS AND MANAGERS ASSOCIATION OF METROPOLITAN DETROIT, a Michigan non-profit corporation, et al., *Plaintiffs,* vs. MICHIGAN PUBLIC SERVICE COMMISSION, et al., *Defendants.*	Docket No. 12410-C Opinion and Order Granting Plaintiffs' Motion for Summary Judgment in Part

At a session of said Court held in the Circuit Court-rooms, City of Lansing, County of Ingham, State of Michigan, on the 11th day of April, A.D. 1973.

PRESENT: HONORABLE RAY C. HOTCHKISS, Circuit Judge.

Upon the Motion of Building Owners & Managers Association of Metropolitan Detroit for Summary Judgment;

The Court having reviewed the pleadings, heard argument in open Court and being cognizant of the memoranda of law of the respective parties, is of the opinion that Building Owners & Managers Association of Metropolitan Detroit's Motion for Summary Judgment should be and the same is hereby granted in part.

There can be no contention that the Public Service Commission does not have authority and jurisdiction in this matter since MCLA 460.6 explicitly states:

> The Michigan public service commission is hereby vested with complete power and jurisdiction to regulate all public utilities in the state except any municipally

> owned utility and except as otherwise restricted by law. It is hereby vested with power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service and all other matters pertaining to the formation, operation or direction of such public utilities. It is further granted the power and jurisdiction to hear and pass upon all matters pertaining to or necessary or incident to such regulation of all public utilities . . .

The principal issue present in this action is whether notice of the Detroit Edison Company's pending steam rate increase application sent by the Defendant Michigan Public Service Commission solely to the City of Detroit satisfied the requirements of MCLA 460.6a or of fundamental due process, as guaranteed by the United States and Michigan Constitutions. It is the opinion of this Court that that question must be answered in the negative.

MCLA 460.6a by its own wording requires that more adequate notice be given then was given here:

> When any finding or order is sought by any gas, telephone or electric utility to increase its rates and charges or to alter, change or amend any rate or rate schedules, the effect of which will be to increase the cost of services to its customers, notice shall be given within the service area to be affected.

Defendant Michigan Public Service Commission seeks to distinguish this situation by contending that since a steam rate increase is not specifically mentioned, then the statute cannot have any affect in that area. However, MCLA 460.54, which refers to the Public Utilities Commission, which was abolished in 1939 and its functions transferred to the Michigan Public Service Commission pursuant to MCLA 460.4, states the following:

> In addition to the rights, powers and duties vested in and imposed on said commission by the preceding section, its jurisdiction shall be deemed to extend to and include the control and regulation, including the fixing

> of rates and charges, of all public utilities within this state, producing, transmitting, delivering or furnishing steam for heating or power, or gas for heating or lighting purposes for the public use.

It is, therefore, clear that the legislature did not intend to exclude utilities furnishing steam from the Public Service Commission's jurisdiction. The law does not favor repeals by implication and whether or not there has been such a repeal in a given instance rests on the legislative intent. *Northville Coach Line* v. *City of Detroit,* 379 Mich 317 (1967), *Yarger* v. *City of Hastings,* 375 Mich 413 (1965).

Defendant Commission also contends that since rate-making is of its very nature a legislative function there can be no constitutional due process requirement that rate-payers receive notice of hearings amending utility rates. However, this argument ignores the fact that the legislature has delegated the rate-making authority as regards all utilities to the Michigan Public Service Commission except for those that are municipally owned. See MCLA 460.6, *supra.* This delegation of authority to the Public Service Commission charges the Commission with the "duty of considering testimony offered by the parties, determining facts therefrom, and drawing legitimate inferences from the facts found to be established by competent proofs," *Shaw* v. *General Motors Corp.,* 320 Mich. 338, 345 (1948). "Fact-finding powers will always be labeled quasi-judicial". Institute of Continuing Legal Education, *The New Michigan Administrative Procedures Course Handbook* (1970), p. 26; *Argo Oil Corporation* v. *Atwood,* 274 Mich 47 (1935); *In re Brewster Street Housing Site,* 291 Mich 313 (1939), and as such the

> Agencies and administrative boards may not, in the exercise of quasi-judicial powers, act ex parte or in a peremptory manner. The limited nature of judicial review of administrative rulings imposes upon the agencies the requirement of compliance with present notions of procedural due process.

Institute of Continuing Legal Education, *supra, Milford* v. *People's Community Hospital Authority,* 380 Mich 49 (1968).

Having established that procedural due process is a necessary ingredient in a quasi-judicial proceeding, it becomes necessary to inquire as to what constitutes procedural due process. In *Dation* v. *Ford Motor Co.,* 314 Mich 152, 163 (1946), the Michigan Supreme Court stated:

> The words "due process of law" when applied to judicial proceedings mean a course of legal conduct consonant with rules and principles established in our system of jurisprudence for the protection and enforcement of private rights. Due process requires notice before judgment and an opportunity to be heard in an orderly proceeding adapted to the nature of the case, and the right of appeal from review of a decision regarded by a litigant as unjust.

The United States Supreme Court has spoken out on this issue in *Morgan* v. *United States,* 304 US 1, 22 (1937), where Chief Justice Hughes wrote:

> The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.

Having determined that notice is a requirement of procedural due process in a quasi-judicial proceeding, the next question which arises is whether the notice given by

the Public Service Commission in a letter sent to the City of Detroit apprising the City of the pending application or of the hearings was such adequate notice as to satisfy the fundamentals of due process. The leading case in this area is *Mullane* v. *Central Hanover B. & T. Co.*, 339 US 306 (1949). That case involved the question whether notice by publication was constitutionally sufficient notice to beneficiaries on judicial settlement of accounts by the trustee of a common trust fund established under the New York Banking Law. In answering this issue in the negative, the United States Supreme Court said at page 314:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (Citing cases). The notice must be of such nature as reasonably to convey the required information, *Grannis* v. *Ordean*, 234 US 385, 58 L ed 1363, 34 S Ct 779, *supra*, and it must afford a reasonable time for those interested to make their appearance, *Roller* v. *Holly*, 176 US 398, 44 L ed 520, 20 S Ct 410, *supra*, and cf. *Goodrich* v. *Ferris*, 214 US 71, 53 L ed 914, 29 S Ct 580.
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> ***
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> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, . . . or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

The Michigan case of *Alan* v. *Wayne County,* 388 Mich 210 (1972), which involved the question of whether valid notice had been given under a section of the Revenue Bond Act (MCLA 141.133) in the ratification of stadium bonds, held at page 350:

> We do not hold that due process requires personal notification of every taxpayer, nor do we hold that there must be any mailed notice or *personal* notice to everyone. *Mullane* holds only that the method of notice chosen must give reasonable assurance of actually giving notice in light of other available means:
>
> "The statutory notice to known beneficiaries is inadequate, *not because it in fact fails to reach everyone,* but because *under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand.*" Mullane, 319. (Emphasis added.)
>
> The kind of notice required depends on the circumstances of the case and the availability of other means in both a theoretical and economic sense.

Applying this rationale to the instant case, the Court is of the opinion that notice sent merely to the City of Detroit is not adequate notice and is not a method of notice which gives "reasonable assurance of actually giving notice in light of other available means", *Alan* v. *Wayne County, supra.* Methods such as including printed notice with or stamped notice on the bills sent out by the utility are not inconsistent with the reasoning of *Mullane* or *Alan.* The Court is not ordering that notice must be given in the above-stated manner but is only illustrating the methods available which are easily adoptable and economical.

Now Therefore, IT IS ORDERED, that this matter be remanded to the Michigan Public Service Commission for the purpose of giving adequate notice to individual users consistent with the rulings of this Court.

IT IS FURTHER ORDERED, that no action be taken as to the issue of whether the Public Service Commission findings were reasonable as to the steam rates increase until such time as the Commission has taken further evidence as submitted by the Plaintiff parties or other interested parties and redetermined such rates if deemed appropriate.

RAY C. HOTCHKISS

Ray C. Hotchkiss, Circuit Judge

APPENDIX B

STATE OF MICHIGAN

In the Circuit Court for the County of Ingham

BUILDING OWNERS AND MANAGERS ASSOCIATION OF METROPOLITAN DETROIT, a Michigan non-profit corporation, et al., *Plaintiffs,* vs. MICHIGAN PUBLIC SERVICE COMMISSION, et al., *Defendants.*	Docket No. 12410-C Opinion and Order Denying Plaintiffs' Motion for Supplemental Order

At a session of said Court held in the Circuit Court-rooms, City of Lansing, County of Ingham, State of Michigan, on the 11th day of January, A.D. 1974.

PRESENT: HON. RAY C. HOTCHKISS, CIRCUIT JUDGE

Upon the Motion of the Plaintiffs for Supplemental Order;

The Court having heard argument in open Court and being cognizant of the briefs of the respective parties is of the opinion that Plaintiffs' Motion for Supplemental Order should be and the same is hereby denied.

This Court's Opinion, rendered April 11, 1973, made no determination as to whether the steam rates granted to Detroit Edison by the Michigan Public Service Commission on September 21, 1970, were unreasonable or confiscatory. The only determination made was that proper notice of the application to increase steam rates must be given to those customers of Detroit Edison. The remand to the Public Service Commission was for the purpose of giving the no-

tice required and then having a subsequent hearing as to whether the rates granted in 1970 were excessive or not taking into consideration any evidence that existed at the time of the original rate hearings which any interested party may wish to submit.

The Court's authority for denying the motion is *Michigan Consolidated Gas Company* v. *Michigan Public Service Commission,* 389 Mich 624, 1973. In this case Ingham County Circuit Judge's decision to remand an appealed rate order to the Public Service Commission for reconsideration while issuing a temporary injunction granting a rate increase over and above that authorized by the Commission, subject to possible refund, was upheld by the Supreme Court of Michigan.

The Supreme Court sustained the action of the Circuit Court stating at page 640:

> Since rates cannot be made to operate retroactively, the best method of preserving the rights of all parties, a case for unreasonable action by the commission having been made out, is the device of a temporary injunction.

In the present case there exists no need to show that the commission acted unreasonably, all the Defendant asks is that the rates previously determined by the Commission be held in effect until such time as the rehearing, with proper notice given, takes place. If the Commission then finds that its order of September 21, 1970, was excessive, it can then make a determination as to what the rates should have been. This Court retains jurisdiction to determine the manner of refunding, if any is deemed necessary, along with the interest rate to be charged. In order to assure the customers of Detroit Edison their refund if the rates are found to be excessive, the Court will require Detroit Edison to post a bond in the amount of Ten Million Dollars ($10,000,000.00). Under the reasoning of the *Michigan Con-*

solidated Gas Company case, the Court has no other alternative but to require the posting of such a bond.

Now Therefore,

IT IS ORDERED that the Plaintiffs Motion for Supplemental Order should be and is hereby denied.

IT IS FURTHER ORDERED that the Defendant Detroit Edison post a bond in the amount of Ten Million Dollars ($10,000,000.00) to insure the refund of any excessive steam rates the Public Service Commission may determine in its rehearing. Such bond to be posted within twenty (20) days of the entry of this Opinion and Order.

RAY C. HOTCHKISS

RAY C. HOTCHKISS, Circuit Judge

APPENDIX C

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Grand Rapids, on the nineteenth day of April in the year of our Lord one thousand nine hundred and seventy-four.

BUILDING OWNERS AND MANAGERS ASSOCIATION OF METROPOLITAN DETROIT, a Michigan non-profit corporation, et al.,
Plaintiffs-Appellants,

vs.

MICHIGAN PUBLIC SERVICE COMMISSION,
Defendant-Appellee,

and

DETROIT EDISON COMPANY,
Intervening Defendant-Appellee.

Present the Honorable

Thomas M. Burns
Presiding Judge

Glen S. Allen, Jr.
Wade Van Valkenburg
Judges

No. 19724 L.C. # 12410-C

In this cause an application for leave to appeal is filed by plaintiffs-appellants, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application be, and the same is hereby DENIED for failure to persuade the Court of the need for immediate appellate review.

STATE OF MICHIGAN—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court

in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 23rd day of April in the year of our Lord one thousand nine hundred and seventy-four.

RONALD L. DZIERBICKI

Clerk

APPENDIX D

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Lansing, on the 9th day of May in the year of our Lord one thousand nine hundred and seventy-four.

BUILDING OWNERS & MANAGERS ASSOC. OF METROPOLITAN DETROIT, a Michigan nonprofit corp., BOOK BUILDING CO., a Michigan limited partnership, et al,

Plaintiffs-Appellants,

v.

MICHIGAN PUBLIC SERVICE COMMISSION,

Defendant-Appellee Cross-Apellant,

and

DETROIT EDISON COMPANY

Intervening Defendant-Appellee.

Present the Honorable

Robert J. Danhof
Presiding Judge

Timothy Quinn
S. Jerome Bronson
Judges

No. 19370
L.C. No. 12410-C

In this cause intervening defendant-appellee has filed a motion to dismiss the appeal, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the appeal and cross-appeals be, and they are hereby, DISMISSED for lack of jurisdiction for the reasons that the orders of the circuit court sought to be appealed do not constitute a final judgment.

STATE OF MICHIGAN—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 9th day of May in the year of our Lord one thousand nine hundred and seventy-four.

RONALD L. DZIERBICKI

Clerk

APPENDIX E

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, *Held* at the Supreme Court Room, in the City of Lansing, on the 24th day of July in the year of our Lord one thousand nine hundred and seventy-four.

Present the Honorable THOMAS M. KAVANAGH, Chief Justice, THOMAS G. KAVANAGH, JOHN B. SWAINSON, G. MENNEN WILLIAMS, CHARLES L. LEVIN, MARY S. COLEMAN, JOHN W. FITZGERALD, Associate Justices.

CR 13-63

BUILDING OWNERS AND MANAGERS ASSOCIATION OF METROPOLITAN DETROIT, a Michigan non-profit corporation, et al,
Plaintiffs-Appellants,

v.

55959

MICHIGAN PUBLIC SERVICE COMMISSION,
Defendant-Appellee,

and

DETROIT EDISON COMPANY,
Defendant-Appellee.

Present the Honorable

THOMAS M. KAVANAGH,
Chief Justice,

THOMAS G. KAVANAGH,
JOHN B. SWAINSON,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
MARY S. COLEMAN,
JOHN W. FITZGERALD,

Associate Justices

On order of the Court, the application for leave to appeal is considered, and the same is hereby DENIED, because the appellants have failed to persuade the Court that the question presented should be reviewed by this Court.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 24th day of July in the year of our Lord one thousand nine hundred and seventy-four.

DONALD F. WINTERS

Clerk